IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1849

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

—against—

GERALD L. SHARGEL, Attorney in Behalf of VINCENT ALOI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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On March 3, 1980, this Court held in *United States* v. *Apfelbaum,* 78-972 that the Fifth Amendment did not preclude the use of a witness' immunized testimony at a subsequent prosecution for perjury, "so long as that testimony conforms to otherwise applicable rules of evidence." (Majority Slip Op. p. 16). Petitioner in the instant case has claimed that the issues contained in *Apfelbaum* and this case are identical.* Although the District Court, in granting federal habeas relief, relied in part upon the Third Circuit's decision in *Apfelbaum,* the Court of Appeals in

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* See State's Petition for Certiorari at pages 11-15 and letter to the Clerk of this Court from Henry J. Steinglass, Assistant District Attorney dated September 19, 1979.

its *per curiam* affirmance found it unnecessary to adopt the ruling in that case.

> We find it unnecessary to decide in this case whether the *Apfelbaum* more liberal standard should be applied to determine the extent to which Aloi's immunized testimony may be used to prove that he gave perjurious testimony in the same proceeding since, even under the more liberal *Cameron* standard it was clearly improper to admit virtually all of his immunized Grand Jury testimony. 596 F.2d at p. 44.

Respondent's position, as stated in the brief in opposition to the petition for a writ of certiorari, is that this case cannot and should not be disposed of by resolution of the *Apfelbaum* issue. At the expense of brief repetition,

> In *Apfelbaum* truthful immunized testimony, *relevant* to the prosecution's case, was held inadmissible since it went beyond the *corpus delicti* of the perjury charge. The *Apfelbaum* rule therefore is far more stringent than the "rule" interpreted from the broader language found in *Cameron*. The point to be made here is that the instant case does not contain an *"Apfelbaum"* issue. (Respondent's brief, p. 6).

Now that the Third Circuit's ruling in *Apfelbaum* has been swept away, indeed by a virtual tidal wave, the fact remains that this case should not be found to have been swept away with it.

In the instant case the truthful immunized testimony was neither relevant to nor probative of the false swearing. As stated by the Court of Appeals:

> Assuming at least some of [the testimony] was truthful, it had no *probative value* in determining whether the alleged perjurious portion was intentionally false. 596 F.2d at p. 44.

The *Apfelbaum* case deals with a situation where, as earlier noted, the disputed testimony was relevant. This Court concluded therefore that ". . . neither the immunity statute nor the Fifth Amendment preclude the use of respondent's immunized testimony at a subsequent prosecution for making false statements, so long as that testimony conforms to otherwise applicable rules of evidence." (Majority opinion p. 16). Here, since the testimony was found by both the District Court and the Court of Appeals not to have been relevant, it is the Fifth Amendment which precludes introduction. *Cameron* v. *United States,* 231 U.S. 710 (1914). Plainly stated, there is a constitutional shield which bars introduction of truthful immunized testimony which has no conceivable bearing on the prosecution's perjury case. Where, as here, a state trial judge ruled such testimony admissible, a constitutional violation has resulted.

CONCLUSION

For these reasons and for the reasons stated in Respondent's initial brief, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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